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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1144

PAUL MILSTEIN, SEYMOUR MILSTEIN, GLORIA MILSTEIN FLANZER, and MORRIS MILSTEIN,

Petitioners,

—v.—

GAF CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (AND APPENDIXES)

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GAF CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted in opposition to the Milsteins' petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of the judgment of that Court which, *inter alia,* reversed the judgment of the United States District Court for the Southern District of New York dismissing the complaint for failure to state a claim under Section 13(d) of the Securities Exchange Act of 1934, as amended (the "Act" or the "1934 Act"). The opinion of the Court of Appeals is officially reported at 453 F.2d 709.

Question Presented

The petitioners contend that there is only one question presented which they assert is whether the "formation of a group whose members collectively own more than 10% of the outstanding shares of a given class of registered stock require[s] a filing under § 13(d)" of the Act (PP 2).[1]

We disagree. The Court below held, in addition to answering such question in the affirmative, that GAF's complaint stated two additional independent claims against the Milsteins for violation of Section 13(d). The first is that the Milsteins intentionally filed false and misleading Schedules 13D (PP App. A 18a-19a) and the second is that, even if *arguendo* the Milsteins were not required to file a Schedule 13D and that their Schedules 13D were accurate and not misleading when filed, they violated Section 13(d) by not correcting such Schedules when they caused material and highly important changes to occur in the facts they had previously set forth (PP App. A 19a-20a).

The Court of Appeals, after observing that Section 13(d)(2) "places a continuing obligation on the person filing to amend his statements '[i]f any material change occurs in the facts set forth,'" pointed out that "[i]ndeed, it is an argument not without force to urge that false statements immediately place those required to file in violation of Rule 13d-2 which requires 'prompt' amendment" (PP App. A

[1] References to the petitioners' petition for a writ of certiorari (the "principal petition") appear, for example, as (PP 2). References to the opinion of the Court of Appeals below are to pages of Appendix A to the principal petition and appear, for example, as (PP App. A 7a). References to the opinion of the District Court are to pages of Appendix B to the principal petition and appear, for example, as (PP App. B 7b).

19a-20a). That Court, after noting that the Milsteins in their first Schedule 13D disclaimed any present intention to acquire additional GAF securities and that Paul and Seymour Milstein then proceeded within the next two months to purchase 83,800 shares of GAF common stock before any amendment was filed, concluded that "even assuming that the statement filed on September 24 accurately and truthfully reflected their intentions, clearly those intentions changed when the Milsteins decided to make the additional purchases and before those purchases were actually completed" (PP App. A 20a, n. 23).

Thus it can be seen that the question presented by the Milsteins does not adequately state the matters this Court must inevitably resolve if it reviews the decision below. Before this Court could properly reverse the judgment of the Court below with respect to Section 13(d), it would have to conclude that intentionally false and misleading Schedules 13D filed with the Commission, the issuer, and the various stock exchanges on which the issuer's securities are traded do not violate Section 13(d) and Rule 13d-2 and that shareholders who file a Schedule 13D are under no obligation to amend or correct it when they subsequently cause events to occur rendering statements in their filing untrue. In addition, this Court would have to hold that Section 13(d) does not require disclosure by shareholders collectively owning more than 10% of a class of securities where they act as a group to take control of the issuer and intend to purchase additional securities and thereafter purchase large amounts of another class to increase their collective voting power.[2]

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[2] It is also noteworthy that the Milsteins' Question Presented totally elides the fact that they are charged with forming their group

Statutes and Regulations Involved

Although the principal petition purports to set forth in Appendix C the "relevant provisions" of Section 13(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(d)) "applicable in this case" (PP 2), other provisions of Section 13(d) equally relevant to the matter at bar are conspicuously omitted.[3] In addition, the petitioners omit Rule 13d-2 promulgated by the Securities and Exchange Commission (the "Commission") (17 C.F.R. § 240.13d-2 (1970)), which requires that if any material change occurs in a Schedule 13D, the filer "shall promptly file . . . an amendment disclosing such change." Accordingly, the complete text of Section 13(d), as enacted and in effect during the period relevant to the case at bar, as well as the complete text of Rules 13d-1 and 13d-2, both of which are referred to herein, are annexed as Appendix I.

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for the purpose of taking over control of GAF and at that time had the intent to hold their GAF securities as well as to acquire additional GAF securities for that purpose.

[3] The principal petition omits *inter alia* subsections (D) and (E) of Section 13(d)(1) and Section 13(d)(4). Subsection (E) indicates that Section 13(d) was intended to require disclosure of "information as to *any* contracts, arrangements, or understandings with *any* person with respect to *any* securities of the issuer, . . . , naming the persons with whom such contracts, arrangements or understandings have been entered into, and giving the details thereof." (Italics here and throughout this brief are ours unless otherwise indicated.) Section 13(d)(4) provides that any of the issuer's securities held by or for the issuer shall not be considered to be outstanding securities for purposes of determining any percentages under Section 13(d) thereby refuting the Milsteins' contention (PP 4) that GAF's cancellation of its Ruberoid holdings in 1967 was the sole cause of the Milsteins' aggregate holdings increasing to 10.25%.

Statement of the Case

A. Basis for Federal Jurisdiction.

Federal jurisdiction in the District Court is based on Section 27 of the 1934 Act, 63 Stat. 107, 15 U.S.C. § 78aa.

B. The Proceedings Below.

Respondent GAF, the plaintiff below, is a publicly owned corporation organized under the laws of the State of Delaware whose shares are traded on the New York and other stock exchanges and owned by more than 125,000 persons. The petitioners, defendants below, are four stockholders, Paul Milstein, his brother Seymour Milstein, his sister Gloria Milstein Flanzer and his father Morris Milstein (the "Milsteins").

On December 16, 1970 GAF filed its complaint in the District Court for the Southern District of New York charging the Milsteins with various violations of Section 13(d) of the 1934 Act. The complaint also charges the Milsteins with violations of Section 10(b) of the 1934 Act. On January 19, 1971 the Milsteins moved to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. On March 22, 1971 District Judge Milton Pollack dismissed the complaint on the grounds that GAF failed to state a claim under Section 13(d) and that GAF lacked standing to assert its Section 10(b) and Rule 10b-5 claims. GAF appealed and on December 13, 1971 the Court of Appeals for the Second Circuit reversed the District Court's dismissal of GAF's 13(d) claims and af-

firmed the District Court's holding on Section 10(b) and Rule 10b-5.[4]

C. GAF's Complaint.

The District Court, on the Milsteins' motion pursuant to Rule 12(b)(6), held that GAF's complaint failed to state a claim for violation of Section 13(d). The following paragraphs set forth the operative charges contained in GAF's complaint concerning the Milsteins' violations of Section 13(d):[5]

After July 29, 1968, the effective date of Section 13(d), the Milsteins "formed a conspiracy among themselves and other persons to act as a syndicate or group for the purpose of acquiring, holding, or disposing of securities of GAF with the ultimate aim of seizing control of GAF for their own personal and private purposes" and that such "conspiracy continues unabated" (App. II-2). The petitioners own and have owned for more than 2½ years more than 10% of GAF's issued and outstanding preferred stock (App. II-2, 3). The Milsteins in furtherance of their

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[4] The Court below concluded that since it had found that GAF had standing under Section 13(d), there was "no compelling reason" to grant standing under Rule 10b-5 (PP App. A 22a). GAF does not disagree with that conclusion inasmuch as it desires to pursue its remedies in the District Court without further delay in accordance with the decision of the Court below. If, however, this Court should grant the principal petition, which we believe and show herein would be inappropriate, GAF has conditionally cross-petitioned for a writ of certiorari (No. 71-1161) to review the denial of GAF's standing to seek injunctive relief under Rule 10b-5, the writ to issue only in the event this Court should grant the principal petition.

[5] For the convenience of the Court, the complaint is appended hereto as Appendix II and references to it appear herein as, for example (App. II-5).

takeover plan sought senior management and board positions at GAF for Seymour Milstein, withdrew huge amounts of business normally placed with GAF by companies whose operations they controlled (causing GAF to lose approximately three-quarters of a million dollars in profits), sought access to information concerning GAF not lawfully available to them, sought to enlist the support of third parties in their effort to seize control of GAF, obtained confidential information and documents concerning GAF's internal affairs from present and former employees of GAF, unfairly disparaged the management of GAF, depressed the market price of GAF stock to facilitate the acquisition of additional shares, and commenced a purported derivative action, *Milstein* v. *Werner, et al.*, 70 Civ. 2178 (U.S.D.C., S.D.N.Y.), and a companion action in the New York courts to further disparage GAF's management and depress the price of GAF stock (App. II-3, 4).

In furtherance of their takeover plan the Milsteins failed to file any Schedule 13D in order to conceal, among other things, their acquisition of substantial amounts of GAF's securities at depressed prices. They finally filed on September 24, 1970, long after they were obliged to do so (App. II-4, 5). Prior to September 24, 1970 defendants Paul and Seymour Milstein acquired beneficial ownership of 62,000 and 64,000 shares, respectively, of GAF common stock from sellers who, together with the investing public, lacked the benefit of the disclosure required of the Milsteins (App. II-5).

The complaint also charges that the Milsteins filed with the Commission, various stock exchanges, and GAF the Schedule 13D dated September 24, 1970 referred to above and another Schedule 13D dated November 10, 1970 (App.

II-4, 5); that the Milsteins failed to file any amendment or correction to their first Schedule 13D until their second filing of November 10, 1970 (if that be deemed an amendment); and that defendants Paul and Seymour Milstein, in direct contravention of statements they made in their September 24, 1970 filing, each acquired the beneficial ownership of 41,650 shares of GAF common stock to the detriment of the GAF shareholders who sold to them (App. II-5).

The Milsteins' Schedules 13D filed under dates of September 24 and November 10, 1970 are annexed to GAF's complaint as Exhibits A and B, respectively, and are included in Appendix II hereto. GAF charges that both Schedules were false and misleading in at least the following material respects:

> "(A) [The Milsteins] disclaim any present intention of acquiring additional securities of GAF in the future. However, they admit in their second Schedule 13D, that within one month of the filing of their first Schedule 13D, they commenced the acquisition of the beneficial ownership of an additional 83,300 shares of GAF common stock.
>
> • • •
>
> "(C) Contrary to the fact that it is their present intention to seize control of GAF, and has been for some time, they state that not until some future time, if ever, will they determine to attempt to acquire control of GAF.
>
> • • •
>
> "(E) They state that the substantial amounts of GAF common stock held by defendants Paul and Seymour Milstein were acquired and are being held for investment. In truth this stock was acquired, has been,

and is being held in furtherance of the conspiracy heretofore alleged." (App. II-6)

In addition, the complaint charges that in both Schedules 13D the Milsteins omitted to make *inter alia* the following material statements:

> "(A) Their present intention to acquire control of GAF.
>
> • • •
>
> "(C) Their plans and proposals with respect to GAF in the event they succeed in seizing control, including liquidation of any parts or divisions of GAF or the sale of any of GAF's assets or the merger of it with another company or other major changes in GAF's business or corporate structure.
>
> "(D) The source and amount of funds or other financial arrangements used or to be used in the acquisition of securities by defendants and their associates." (App. II-7)

Because the Milsteins' Rule 12(b)(6) motion in the District Court was coupled with a motion for summary judgment under Rule 56, the record before both the District Court and the Court of Appeals contained highly significant additional facts conceded by the petitioners which corroborated GAF's charges. On January 27, 1971 the Milsteins filed a third Schedule 13D which again reiterated verbatim their disclaimer of any intention on their part to acquire additional GAF securities. Although each of the three Milstein Schedules 13D disclaimed any intention to acquire additional GAF securities, the first and third filings were quickly followed by massive purchases of such securities and the second Schedule 13D was certified by the Milsteins on the very day that both Paul and Seymour

Milstein purchased additional GAF stock. Less than one month after the first statement was filed, *before* any correction or amendment was filed, and while the false Schedule 13D was in the public domain, Paul and Seymour Milstein continued their secret purchases of GAF securities by each purchasing the previously noted 41,650 shares of GAF common stock at a combined cost of more than $840,000 in identical quantities through the same broker at identical prices on the same four days, October 21, 27 and 29 and November 10, 1970. Less than two weeks after the third filing and *before* any correction or amendment was filed, Paul Milstein made the following purchases of GAF common stock: on February 8, 1971 he purchased 100 shares; on February 12, 9,800 shares; on February 16, 1,400 shares; on February 17, 16,000 shares; and on February 19, 1,000 shares.

The Milsteins continued their joint activities in furtherance of their common takeover plan in secret as alleged in GAF's complaint, until finally on January 26 and 27, 1971 they publicly admitted their intention to wage a proxy fight for control of GAF at the company's 1971 annual meeting of stockholders.

The complaint and the record facts thus showed that the Schedules 13D filed by the Milsteins were untimely, false, misleading, and incomplete. From the face of the Schedules 13D alone it is established beyond doubt that the Milsteins purchased $2.5 million of GAF common stock (now worth substantially more than $5 million) from other GAF stockholders during a period in which they concealed material information from those shareholders and other current and potential investors in the company.

Summary of Argument

The principal petition should be denied because the decision below plainly is not a final judgment. The action ordered by the Court of Appeals was to remand GAF's Section 13(d) claims to the District Court. Review by this Court at this time is both inappropriate and inconsistent with the Court's policy of not reviewing interlocutory orders. (Point 1)

Review of the question presented by the Milsteins serves no useful purpose because the decision below clearly must be affirmed on either of two alternate independent grounds, namely that the Milsteins' false and misleading Schedules 13D violate Section 13(d) and that Rule 13d-2 imposes a continuing obligation on one who files a Schedule 13D to "promptly" amend the Schedule when a "material change occurs in the facts set forth." (Point 2)

The petition should also be denied because there is no conflict between the decision below and that of the Court of Appeals for the Seventh Circuit in *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7th Cir. 1970) when applied to the facts of this case. The Milsteins violated Section 13(d) under the decisions of both Courts and they cannot properly claim any conflict that would affect the outcome of the case at bar. (Point 3)

Finally, the principal petition should be denied because the Court below was clearly right when it decided that a 10% takeover group is required to file a Schedule 13D within ten days after the group is formed. The language of the statute requires that result, the House and Senate Committee Reports specifically state that to be the intent

of the statute, and any other interpretation would frustrate the purpose of the statute by exempting powerful groups from the statute's salutary disclosure requirements. (Point 4)

Reasons for Denying the Petition

1. The decision below is interlocutory and nonfinal and should not be reviewed at this time.

The action of the Court below, but for the Milsteins' instant application, would result in the remand of this case to the District Court for further proceedings on GAF's Section 13(d) claims. As the Court of Appeals recognized, "we are not yet called upon to determine whether the Milsteins have in fact violated Section 13(d) or, if they have, what relief would be appropriate" (PP App. A 23a). Denial of the Milsteins' petition for certiorari at this time clearly does not preclude them from seeking to obtain review by this Court on the 13(d) question after GAF obtains a final judgment below. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 488, n. 6, *reh. denied*, 393 U.S. 901 (1968); *Mercer* v. *Theriot*, 377 U.S. 152, 153-54, *reh. denied*, 377 U.S. 973 (1964); *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

This Court has repeatedly said that it will not review nonfinal judgments except in the most unusual circumstances. *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940); *American Construction Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893); *cf. Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952). Indeed, the Court has held that lack of finality alone justifies the

denial of certiorari. For example, in *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) the Court said that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." And in *American Construction Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893), the Court said:

> "Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, *unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.*"

The Milsteins' petition hardly qualifies. Indeed it presents no circumstances entitling the Milsteins to any deviation from the Court's policy.

2. The decision below must be sustained on alternate grounds independent of the question presented by the petition.

Aside from whether the Milsteins were required to make the requisite disclosure after they formed their takeover group (the question presented by the principal petition), the Milsteins clearly violated Section 13(d) when they eventually filed intentionally false and misleading Schedules 13D with the Commission, GAF and the various stock exchanges on which GAF's stock is traded and also clearly violated Section 13(d)(2) and Rule 13d-2 when they failed to "promptly" correct or amend their Schedules.

A. The Milsteins' Schedules 13D were demonstrably false and misleading.

On three separate occasions, September 24 and November 10, 1970 and January 27, 1971, the Milsteins filed Schedules 13D stating that "[t]he members of the Milstein family have no present intention as to whether or not any additional securities of GAF may be acquired by them in the future . . . " (App. II-15, 23). Notwithstanding these public disclaimers and in direct contravention of Rule 13d-2 which requires that an amendment be "promptly" filed "[i]f any material change occurs in the facts set forth in the statement . . . ," the Milsteins' first and third filings, as noted above, were followed shortly thereafter by huge purchases of GAF securities, and their second Schedule 13D was certified by the Milsteins on the same day both Paul and Seymour Milstein purchased additional GAF stock. Less than one month after the filing of their first Schedule 13D and while it was available to all of the shareholders of GAF and the investing public, as well as the Commission and the company, and without any correction or amendment Paul and Seymour Milstein continued their secret purchases of GAF securities by *each* purchasing 41,650 shares of GAF common stock at a combined cost of more than $840,000 in identical quantities through the same broker at identical prices on the same four days. Then, less than two weeks after they filed their third 13D and again without any correction or amendment, Paul Milstein purchased an additional 28,300 shares. Certainly the Milsteins' statement, available to all GAF shareholders, that they had no intention to acquire additional GAF securities was not only false but was required to be amended *before* they acquired such se-

curities. Simple honesty, as well as the statute and the Rule, compelled as much.

B. The Court below properly held that a false and misleading Schedule 13D violates Section 13(d) and that even if the Milsteins' statements were true when made the Milsteins were required to amend them when they caused material changes in the facts as set forth therein.

The Milsteins continue to argue (PP 13-14) that an intentionally false and misleading Schedule 13D does not violate Section 13(d). The Court of Appeals flatly rejected that argument and correctly "conclude[d] that the obligation to file *truthful* statements is implicit in the obligation to file . . . " (PP App. A 18a; italics are the Court's). Judge Kaufman said that

> ". . . section 13(d) was intended to alert investors to potential changes in corporate control so that they could properly evaluate the company in which they had invested or were investing. Disclosure which is false or misleading subverts this purpose. In some instances, a false filing may be more detrimental to the informed operation of the securities markets than no filing at all. We also find support for our conclusion in section 13(d)(2) which places a continuing obligation on the person filing to amend his statements '[i]f any material change occurs in the facts set forth.' Indeed, it is an argument not without force to urge that false statements immediately place those required to file in violation of Rule 13d-2 which requires 'prompt' amendment.[22] "

" [22] GAF informs us that the Milsteins' first Schedule 13D, dated September 24, 1970, was false because it disclaimed any present intention to acquire additional stock, whereas Paul and Seymour

> Milstein purchased 83,800 shares of GAF common stock within the next two months. The Milsteins, however, did not amend their Schedule 13D until after these purchases were completed. Thus, even assuming that the statement filed on September 24 accurately and truthfully reflected their intentions, clearly those intentions changed when the Milsteins decided to make the additional purchases and before those purchases were actually completed." (PP App. A 19a-20a)

The holding of the Court of Appeals that a false Schedule 13D violates Section 13(d) is entirely consistent with the established practice of the Commission in issuing stop orders against false statements found in registration statements whether or not such statements are required. *E.g., Southern Industrial Loan Co.*, 10 S.E.C. 617, 631-32 (1941); *Central Specialty Co.*, 10 S.E.C. 1094 (1942); *Reiter-Foster Oil Corp.*, 6 S.E.C. 1028 (1940); *Emporia Gold Mines*, 2 S.E.C. 209 (1935); *Commonwealth Bond Corp.*, 1 S.E.C. 13 (1934); *Unity Gold Corp.*, 1 S.E.C. 25 (1934).

Rather than dealing directly with Judge Kaufman's sound reasoning, the Milsteins argue in a contrived manner that the holding that a false Schedule 13D violates Section 13(d) is "unnecessary" and "mischievous" (PP 13-14).

Judge Kaufman's penetrating observation that a false filing has a greater potential for injuring the investing public than no filing at all demonstrates the necessity for the Court's conclusion. The remedial purpose of the 1934 Act clearly requires maximizing the likelihood of civil liability for those who would intentionally make false filings, see *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert.*

den., 397 U.S. 913 (1970); *S. Rep. No. 792, 73 Cong. 2d Sess.* (1934), and Section 13(d) has within it the capacity to impose civil liability for false filings not imposed under other sections of the Act. Nor does potential criminal liability under Section 32(a) of the 1934 Act make the Court's holding below unnecessary because, as is generally acknowledged, criminal liability is an inadequate deterrent. The Court below, in another context, poignantly observed that the volume of work with which the Commission must deal plainly precluded a careful scrutiny of the multitudinous filings made with it (PP App. A 20a), and this obviously entails an even greater inability to discern in all cases when a crime has been committed.

The Milsteins' argument (PP 14) that the decision of the Court below "may be positively mischievous • • • when applied to [the 1933 Act]" upon analysis turns out to be a strawman. It erroneously assumes that the Federal courts will recklessly apply interpretations of the 1934 Act to the 1933 Act and that they will not imply any defenses that may reasonably be appropriate. The thrust of the Milsteins' argument is that the supposedly "symmetrically drafted" statutory framework would be upset. But, as this Court well knows, in order to give full effect to the Securities Acts it has been necessary for it to recognize private rights of action where Congress failed to do so. *Supt. of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971); *J. I. Case Co.* v. *Borak, supra.*

When the rhetoric is unmasked it becomes clear that the Milsteins' view requires the totally unwarranted premise that Section 13(d) is satisfied by any filing whether or not it is truthful, a reading that would emasculate the statute.

C. Review by certiorari is inappropriate where the decision below must be sustained on an alternate independent ground.

Certiorari should not be granted where the decision sought to be reviewed is clearly right on an independent or alternative ground, *i.e.*, one other than that upon which the petitioner seeks review. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959). See also Stern and Gressman, *Supreme Court Practice*, 157 (4th ed. 1969). Indeed, even where, as is not the case here, the decision below presents a clear conflict with another Court of Appeals decision, certiorari has been denied when the resolution of the particular question presented would be irrelevant to the ultimate outcome of the cause. See *id.* at 158 for discussion of *Sommerville* v. *United States*, 376 U.S. 909 (1964).

GAF's charges of false filings, at least insofar as they relate to the Milsteins' statements of their intention not to acquire additional GAF securities, are established unequivocally by admissions made and certified by or on behalf of each of the Milsteins on the face of their Schedules 13D. As shown, even if those statements were true when made they were required by Section 13(d)(2) and Rule 13d-2 to be "promptly" corrected before the Milsteins acquired additional GAF securities. Accordingly, GAF's charges of false filings and failure to amend each present an independent alternate ground upon which the decision of the Court below must be sustained, obviating review by this Court.

3. There is no conflict between the decision below and that of the Court of Appeals for the Seventh Circuit which merits review by this Court.

A. The Milsteins are equally liable under the Seventh Circuit decision in *Bath Industries* as they are under the decision below and similarly the defendants in *Bath* would be liable under the decision of the Court below as they were under the Seventh Circuit's decision.

In *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7th Cir. 1970), the only other decision of a Court of Appeals involving Section 13(d), the Court held that Section 13(d)

> "should be interpreted to require compliance with its disclosure provisions when, but only when, any group of stockholders owning more than 10% of the outstanding shares of the corporation agree to act in concert *to acquire additional shares.* • • • Thus it follows that once the group agrees to act in concert to acquire shares, its members must comply with the Act's disclosure requirements whether or not any one of them has at that time acquired stock in furtherance of the underlying plan." 427 F.2d 109-10; italics are the Court's.

The Court's rationale was that

> "when such a group of existing shareholders reaches the point where it decides to buy additional stock to reinforce its position against management, full disclosure for the benefit and protection of other stockholders and investors will be required. The clear purpose of the legislation is to protect these stockholders and investors, and it is at this point that the need for the Act's protection becomes critical." *Ibid.*

The Milsteins' secret and admitted purchases of massive blocks of GAF common stock after the formation of their

takeover group many months before they filed their first Schedule 13D brings them within the *Bath* determination. But in any event, inasmuch as the Milsteins' application in this Court arises in terms of a demurrer to the complaint, the fact that the petitioners come within the *Bath* holding is plainly evidenced by GAF's allegation that the Milsteins "formed a conspiracy among themselves • • • to act as a • • • group for the purpose of acquiring • • • securities of GAF with the ultimate aim of seizing control of GAF" (App. II-2).

Similarly the facts in *Bath* make clear that the defendants there formed their takeover group many months before they filed their Schedule 13D and thus would come under the holding of the Court below. Accordingly, the *Bath* defendants violated Section 13(d) whether the triggering event was the formation of the group or the group's intention to acquire additional stock.

The petitioners here misleadingly assert a "conflict" upon a narrow difference of interpretation which is wholly unavailing to them.

B. This is not an appropriate case for this Court to review whatever narrow difference may exist between the decision below and the Seventh Circuit's decision in *Bath*.

Certainly this case is not an appropriate vehicle to review the narrow difference in interpretation between *Bath* and the Court below. A resolution of the supposed "conflict" would have extremely limited application. The area of the decision below not encompassed by *Bath* is found in those few situations where a group of shareholders owning

more than 10% (now 5%) of a class of the issuer's securities form a takeover group but do not intend to acquire additional securities and do not thereafter enlarge the group by the addition of one or more shareholders. Thus it can be seen that what the Milsteins present is hardly "an important question of federal law which has not been, but should be, settled by this court." U.S. Sup. Ct. R. 19(1)(c).

This Court has established that review by certiorari is not appropriate where the question presented is important only to the petitioner and not "to the public as distinguished from" the parties before the Court. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1923). The present case hardly approaches Chief Justice Vinson's direction that

> "[t]o remain effective, the Supreme Court [in reviewing petitions for certiorari] must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi.

4. The Court below correctly decided the question presented by the Milsteins' petition.

With respect to the question the Milsteins seek to have this Court review, the Court below held that

> "[o]n the assumption that the facts alleged in the complaint are true, we cannot conclude other than that the four Milsteins constituted a 'group' and thus, as a

> 'person,' were subject to the provisions of section 13(d). We also are aware of the charge that the Milsteins agreed after July 29, 1968, to *hold* their GAF preferred shares for the common purpose of acquiring control of GAF. Furthermore, the individuals collectively or as a 'group' *held* more than 10% of the outstanding preferred shares—a registered class of securities." (PP App. A 8a-9a)

and that "the complaint alleges as a matter of law that the Milstein *group* 'acquired' the . . . stock owned by its members after" the effective date of Section 13(d) "and thus that [GAF's complaint] states a claim under section 13(d)" (PP App. A 9a).

A. The interpretation of Section 13(d) by the Court below is compelled by the language of Section 13(d).

During the period in question Section 13(d)(1) required that

> "any person who, after acquiring *directly or indirectly* the beneficial ownership of any equity security of a class . . . , is *directly or indirectly* the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition . . . file . . . a statement containing [certain specified information]. . . ."

and Section 13(d)(3) provided that

> "When two or more persons act as a partnership, limited partnership, syndicate, or other *group* for the purpose of acquiring, *holding*, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purposes of this subsection."

The language of Section 13(d)(3) clearly specifies that the term "person" as used in Section 13(d)(1) shall be deemed to apply to two or more individuals when those individuals act as a group for the purpose of acquiring, *holding*, or disposing of securities, *i.e.*, a group becomes a "person" at the time its members act together for one of the stated purposes. Thus this statutory person acquires its stock, namely the securities of the members of the group, at the time the individuals comprising the group come together for one of the statutory purposes. This is an entirely reasonable approach and, unlike the Milsteins' reading of 13(d) which limits the statute to acquisitions through purchase, it gives effect to the statutory purposes of "holding" and "disposing" as well as modes of acquisition other than purchase, such as inheritance, gift, assignment, or any indirect beneficial acquisition.[6]

Restricting "acquisition" to purchase plainly contradicts the language of the statute which speaks in terms of direct and *indirect* acquisitions and direct and *indirect* beneficial ownership. Both the Court below and the Court of Appeals in *Bath* recognized the obvious truth that in the context of struggles for corporate control. "voting control of stock is the only relevant element of beneficial ownership." (PP App. A 10a; 427 F.2d at 112)

The Milsteins' restrictive interpretation would also exclude many types of agreements or arrangements which have the potential for changing or influencing control of the issuer contrary to the purpose of Section 13(d)(1)(E)

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[6] Judge Marvin Frankel's prior decision in *Sisak* v. *Wings and Wheels Express, Inc.*, CCH Fed. Sec. L. Rep. ¶92,991 (S.D.N.Y. 1970), contrary to the Milsteins' assertion (PP 6), is entirely consistent with the decision of the Court below.

which requires disclosure "as to *any* contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to . . . the giving or withholding of proxies. . . ."[7]

B. The legislative history of Section 13(d) requires the statute to be construed so that a group must file when the persons comprising it agree to act in concert.

The Senate and House Committee Reports specifically addressed themselves to the very question presented by the Milsteins' petition in these terms:

> "[Section 13(d)(3)] would prevent a group of persons who seek to pool their *voting* or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities. *The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the information called for in section 13(d)(1) within 10 days after they agree to act together, whether or not any member of the group had acquired any securities at that time.* This provision is designed to obtain full disclosure of the identity of any person or group obtaining the benefits of ownership of securities by reason of any contract, understanding, relationship, agreement or other arrangement." *S. Rep. No.*

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[7] Rather than restrict the statute Congress recently expanded it to require groups holding more than 5% to make the requisite disclosure. This occasioned the Court below to aptly comment:

> "Any judicial impetus to cut back on the seeming thrust of the statute must be scrutinized in light of the recent amendment which broadened the impact of section 13(d) by reducing the threshold triggering of the statute from 10% holdings to 5%." (PP App. A 15a, n. 19)

550, 90th Cong., 1st Sess. 8 (1967); *H. R. Rep. No. 1711, 90th Cong., 2d Sess.* 8-9 (1968), *U.S. Code Cong. & Ad. News*, 2811, 2818 (1968).[8]

There was no change in the relevant parts of the bill between the time that it was reported out by both Committees and its ultimate enactment.[9]

The Milsteins are simply wrong when they assert that "the concept of a group acquisition from its individual members" is "*nowhere* referred to in the legislative history" (PP 11). This concept is clearly embraced by the above-quoted statement that "[t]he group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent" even though "no one individual owns more than 10 percent of the securities." These Reports are entitled to the greatest respect inasmuch as they represent the final position of the Congressional bodies charged with responsibility for the bills in question prior to action by the full Congress and were intended by these Committees to explain the effect of the bills to the other members of Congress. See *Commissioner* v. *Bilder*, 369 U.S. 499, 502 (1962); *Duplex Printing Press Co.* v. *Deering*,

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[8] The Milsteins' petition (PP 10) conveniently omits the first and last sentences of this portion of the Reports which indicate that both Committees not only specified that the formation of a 10% takeover group triggers Section 13(d) but also carefully explained just how this result would eliminate the loophole previously available for group activity.

[9] Professor Loss, prior to his retention as special counsel to the Milsteins, cited the above portions of the Senate and House Committee Reports for his conclusion that "[a]ny such group is considered to become the beneficial owner of more than 10 percent *at the time its members agree to act in concert*" and "must file • • • within ten days • • • , *whether or not any member has acquired any security at that time.*" VI Loss, Securities Regulation 3664 (1969 Supp.).

254 U.S. 443, 474-75 (1921); *United States ex rel. Fazio* v. *Tod,* 285 Fed. 847, 851 (2d Cir. 1922); and *Nolan* v. *United States,* 41 F.2d 962, 965 (Ct. Cl. 1930) where the Court said that such reports have "great and generally controlling weight in the construction of statutes".

And it is ludicrous for the Milsteins to claim any kind of "prior restraint" (PP 8) in requiring disclosure *after* the members of the group have come together for a statutory purpose.

C. The decision below effectuates the statutory purpose.

(i) Congress intended Section 13(d) to alert investors to potential shifts in control and the ability to influence control of the issuer.

Drawing upon the history and language of Section 13(d) the Court of Appeals stated that both made it "clear" that

> "the statute was primarily concerned with disclosure of *potential changes* in control resulting from new aggregations of stockholdings and was not intended to be restricted to only individual stockholders who made future purchases and whose actions were, therefore, more apparent." (PP App. A 14a; italics are the Court's)

It was intended that the disclosure required by the statute would alert investors to any accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control. S. Rep. No. 550, *supra,* at 2; H. R. Rep. No. 1711, *supra,* at 3; Hearings on S. 510 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 18 (1967); see PP App. A 13a.

Thus, while Section 13(d)(5)(D) grants the Commission power to exempt from the operation of the statute certain acquisitions and proposed acquisitions of securities, by the specific terms of the statute the Commission may exempt only those acquisitions or proposed acquisitions "as not entered into for the purpose, and not having the effect of changing or influencing the control of the issuer or *otherwise* as not comprehended within the purposes of this subsection."

(ii) The Milsteins' view would result in reopening the very loophole Congress intended to close.

The Milsteins' view of Section 13(d) is directly in the teeth of an important reason advanced for the enactment of the statute—to require disclosure of group activity. Before the statute was passed persons who were not officers or directors of a listed company could form a group to try to take over control without reporting any of the group's intentions, holdings, or purchases, so long as no member of the group owned 10% of any class of stock of the target company. Senator Williams in proposing the bill explained:

> "The term 'person' would be defined for purposes of this bill to include partnerships, syndicates, and other groups formed for the purpose of acquiring, holding, or disposing of securities. This definition would successfully close the loophole that now exists which allows a syndicate, where no member owns more than 10% to escape the reporting requirements of the Securities Exchange Act." 113 Cong. Rec. S445 (daily ed. Jan. 18, 1967).

The enactment of the statute closed that loophole.

(iii) To achieve the statutory purpose disclosure must be made when the takeover group comes together and has the potential for influencing control of the issuer.

All parties agree that the primary purpose of the Williams Act was investor protection. But to provide meaningful investor protection Section 13(d) must come into play when the takeover group comes together and has the potential for changing or influencing control of the issuer. The Milsteins urge that no disclosure is required until after the group has purchased more than 2% of the issuer's stock (and of the same class as the group's) in furtherance of its takeover plan. Not only does their interpretation sacrifice the interests of the former shareholders who decided to sell their securities to the takeover group without having the benefit of any knowledge of the takeover group's existence, identity, and plans respecting the issuer, but it deprives all other shareholders and potential investors of the same information which is obviously of paramount interest to them in the formulation of their daily decisions to acquire, hold, or dispose of the issuer's securities. The necessity for Section 13(d) disclosure *at the time of the formation* of a takeover group and *before* such acquisitions commence was succinctly stated by the Court of Appeals in *Bath*:

> "The purpose of the filing and notification provisions [of Section 13(d)] is to give investors and stockholders the opportunity to assess the insurgents' plans *before* selling or buying stock in the corporation. It additionally gives them the opportunity to hear from incumbent management on the merit or lack of merit of the insurgents' proposals. If the defendant-appellant's late filing is sufficient, then no insurgent group will ever file until news of their existence and plan

leaks out and prompts a law suit. By that time it will be too late to avoid the evils which the Williams Act is designed to eliminate." 427 F.2d at 113; italics are the Court's.

Moreover, the information required by Schedule 13D focuses on the manner in which the takeover group intends to obtain control or utilize its influence over the issuer and is expressly designed to enable other shareholders to make informed investment decisions as to the value of their holdings before they decide to sell, hold, or buy. The thrust of the statute is not forfeiture or damages, but disclosure. Disclosure is a form of preventive medicine. Its purpose and effectiveness are impaired, if not totally crippled, if it is required only after the secret takeover group is on its way to control.

We agree with the petitioners as to the expertise of the Court of Appeals for the Second Circuit in the area of securities law (PP 8) and say further that that Court was unquestionably right in concluding that

> "[t]he alleged conspiracy on the part of the Milsteins is one clearly intended to be encompassed within the reach of section 13(d). We have before us four shareholders who together own 10.25% of an outstanding class of securities and allegedly agreed to pool their holdings to effect a takeover of GAF. This certainly posed as great a threat to the stability of the corporate structure as the individual shareholder who buys 10.25% of the equity security in one transaction. A shift in the *loci* of corporate power and influence is hardly dependent on an actual transfer of legal title to shares, and the statute and history are clear on this." (PP App. A 13a-14a)

CONCLUSION

The judgment of the Court below is clearly interlocutory and in any event must be sustained on alternate grounds independent of the question presented by the Milsteins. Nor is the decision below in conflict with any other Court of Appeals decision insofar as the circumstances present here are concerned. And the Court below was correct in holding that the complaint alleges a claim for relief under Section 13(d). Accordingly, the petition should be denied.

Respectfully submitted,

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April 4, 1972

APPENDICES

APPENDIX I

Statutes and Regulations Involved

Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d), as amended and as in effect during the period in question,[1] provided:

> (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—
>
> (A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

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[1] Section 13(d) first became effective on July 29, 1968 and the complaint herein was filed on December 16, 1970. On December 22, 1970, after most of the conduct and transactions of which GAF complains, President Nixon signed Public Law 91-567 which, *inter alia*, reduced to 5% the operative figure under Section 13(d) and added a subsection 13(d)(5), not here relevant, which caused the exemption provisions of former subsection 13(d)(5) to be renumbered as 13(d)(6).

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures,

loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

Rule 13d-1 provides:

Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to Section 12 of the Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing the information required by Schedule 13D.

Eight copies of the statement shall be filed with the Commission. 17 C.F.R. § 240.13d-1 (1970).

Rule 13d-2 provides:

> If any material change occurs in the facts set forth in the statement required by Rule 13d-1, the person who filed such statement shall promptly file with the Commission and send to the issuer and the exchange an amendment disclosing such change. Eight copies of each such amendment shall be filed with the Commission. 17 C.F.R. § 240.13d-2 (1970).

APPENDIX II

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 5502MP

GAF CORPORATION,

Plaintiff,

against

PAUL MILSTEIN, SEYMOUR MILSTEIN, GLORIA MILSTEIN FLANZER and MORRIS MILSTEIN,

Defendants.

Plaintiff, GAF Corporation (hereinafter "GAF"), by its attorneys, Winthrop, Stimson, Putnam & Roberts, alleges, upon information and belief, except Paragraphs 1, 2 and 3, as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal offices at 140 West 51st Street, New York, New York 10020.

2. Defendants are individuals; each defendant resides within this district. Their respective residence addresses are:

Paul Milstein
76 Birchall Drive
Scarsdale, New York 10583

Gloria Milstein Flanzer
40 Dorset Road
Scarsdale, New York 10583

Seymour Milstein
35 Ogden Road
Scarsdale, New York 10583

Morris Milstein
28 Paddington Road
Scarsdale, New York 10583

3. GAF brings this action on behalf of itself and all of its shareholders other than the defendants and any other shareholders conspiring and acting in concert with the defendants.

FIRST CLAIM FOR RELIEF

4. This claim arises under Section 13(d) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78m ("1934 Act"), and Rule 13d-1 promulgated thereunder by the Securities and Exchange Commission (the "Commission"). This Court's jurisdiction over this claim is predicated upon Section 27 of such Act.

5. Defendants herein formed a conspiracy among themselves and other persons to act as a syndicate or group for the purpose of acquiring, holding, or disposing of securities of GAF with the ultimate aim of seizing control of GAF for their own personal and private purposes. This conspiracy continues unabated.

6. In furtherance of this conspiracy the defendants and other persons conspiring and acting in concert with them engaged in the activities hereinafter alleged. All such activities were participated in or carried out by one or more of the defendants in furtherance of the conspiracy to seize control of GAF.

7. Neither plaintiff GAF nor the shareholders on whose behalf it sues has an adequate remedy at law.

8. Defendants Paul Milstein, Seymour Milstein, Gloria Milstein Flanzer and Morris Milstein presently own or hold not less than 352,974 shares of GAF's $1.20 convertible preferred stock. Defendants' holdings in such stock now constitute and for at least the past two and one-half years have

constituted more than ten per cent of the total amount of such stock issued and outstanding.

9. In furtherance of the conspiracy to seize control of GAF, defendants have, *inter alia*:

(A) Sought for Seymour Milstein senior management and board positions with GAF;

(B) Withdrawn substantial business normally placed with GAF by companies whose operations are controlled by defendants;

(C) Sought for themselves and others access to information concerning GAF not lawfully available to them or to such others;

(D) Sought to enlist the support of third parties in their efforts to seize control of GAF;

(E) Obtained from present and former employees of GAF for use in a proxy contest, among other things, confidential information and documents concerning GAF's internal affairs and operations;

(F) Attempted to disparage unfairly the management of GAF in public and in private, among shareholders and in the investment community;

(G) Tried to and did depress the market price of GAF common and preferred stock in order to facilitate the acquisition of additional shares and, consequently, to increase their voting power;

(H) Acquired substantial amounts of additional securities of GAF at depressed prices in the names of nominees, including Messrs. Herzfeld & Stern, Merrill Lynch, Pierce, Fenner & Smith Inc. and others, in order to increase their

voting power as GAF shareholders without publicly disclosing such increase as required by law;

(I) In order to try to disparage the management of GAF and depress the market price of GAF common and preferred stock, brought an action in this Court entitled *Paul Milstein* v. *Jesse Werner, et al.*, 70 Civ. 2178 MP, and a companion action with an identical title in the Supreme Court of the State of New York, New York County, Index No. 19158/70, and within those actions attempted by various discovery devices to attack the validity of GAF's financial statements, the legality of GAF's merger in May 1967 with The Ruberoid Co., and the propriety of GAF's efforts to protect itself from adverse consequences attendant upon devaluation of foreign currency;

(J) Failed to file a statement with the Commission, various stock exchanges, and GAF, as required by Section 13(d) of the 1934 Act and Commission Rule 13d-1 for the purpose of concealing defendants' efforts to acquire substantial quantities of GAF's securities at depressed prices in order to seize control of GAF and long after their obligation to file such a statement had arisen, filed a Schedule 13D and later still, a Restated and Amended version of same, each of which contained material misstatements of fact and omitted to state material facts.

10. Under date of September 24, 1970, the defendants filed with the Commission, various stock exchanges and GAF a document entitled in part "Schedule 13D", a copy of which is annexed hereto as Exhibit A and made a part hereof (and is sometimes referred to hereinafter as the "first Schedule 13D"). Under date of November 10, 1970 the defendants filed with the Commission, various stock exchanges and GAF another Schedule 13D entitled in part

"Restated and Amended Schedule 13D", a copy of which is annexed hereto as Exhibit B and made a part hereof (and is sometimes referred to hereinafter as the "second Schedule 13D").

11. Prior to September 24, 1970, none of the defendants filed any statement or schedule as required by the provisions of Section 13(d). The first Schedule 13D discloses, *inter alia,* that as of September 24, 1970, defendants Paul and Seymour Milstein owned beneficially 62,000 and 64,000 shares, respectively, of GAF common stock. These 126,000 shares of GAF common stock acquired by Paul and Seymour Milstein prior to September 24, 1970 were acquired from sellers who, together with the investing public, lacked the benefit of the disclosure required of the defendants and their group by Section 13(d) and Rule 13d-1.

12. The second Schedule 13D discloses that between October 21, 1970 and November 10, 1970 defendants Paul and Seymour Milstein each acquired beneficial ownership of 41,650 shares of GAF common stock. The defendants failed to file any amendment or correction to their first Schedule 13D until their second Schedule was filed. The 83,300 shares were acquired from sellers who, together with the investing public, were without the benefit of the full and truthful disclosure required by Section 13(d) and Rule 13d-1. The acquisition of these 83,300 shares was, moreover, in direct contravention of certain statements contained in the first Schedule 13D.

13. In both the first and second Schedules 13D the defendants make, *inter alia,* the following material misstatements:

(A) They disclaim any present intention of acquiring additional securities of GAF in the future. However, they admit in their second Schedule 13D, that within one month of the filing of their first Schedule 13D, they commenced the acquisition of the beneficial ownership of an additional 83,300 shares of GAF common stock.

(B) They state that they cannot say whether any additional purchases of GAF securities they would make would be with their own *funds or with funds* borrowed *from* others. Between the respective filings of the first and second Schedules 13D defendants Paul and Seymour Milstein acquired beneficial ownership of an additional 83,300 shares of GAF common stock, yet the second Schedule fails to disclose the source of funds used for this acquisition.

(C) Contrary to the fact that it is their present intention to seize control of GAF, and has been for some time, they state that not until some future time, if ever, will they determine to attempt to acquire control of GAF.

(D) They state that they find it impossible to say what their plans are for GAF in the event they do take over control of the Company.

(E) They state that the substantial amounts of GAF common stock held by defendants Paul and Seymour Milstein were acquired and are being held for investment. In truth this stock was acquired, has been, and is being held in furtherance of the conspiracy heretofore alleged.

(F) They state that each of the Schedules was filed against the advice of their own counsel and because, *inter alia,* counsel for plaintiff and counsel for almost all of the directors of plaintiff advised this Court in a related proceeding that in their opinion a filing was required.

14. In both Schedules 13D the defendants omit to make, *inter alia,* the following material statements:

(A) Their present intention to acquire control of GAF.

(B) The names and activities of others who are identified in such Schedules 13D as associates.

(C) Their plans and proposals with respect to GAF in the event they succeed in seizing control, including liquidation of any parts or divisions of GAF or the sale of any of GAF's assets or the merger of it with another company or other major changes in GAF's business or corporate structure.

(D) The source and amount of funds or other financial arrangements used or to be used in the acquisition of securities by defendants and their associates.

(E) The time or times when Paul Milstein acquired the 62,000 shares of GAF common stock reported in the first Schedule 13D, the time or times when Seymour Milstein acquired the 64,000 shares of GAF common stock reported in the first Schedule 13D, and the acquisition by Paul Milstein and Seymour Milstein of 30,000 shares of GAF common stock between May 27, 1970 and September 23, 1970.

15. The defendants and their group have violated and continue to be in violation of Section 13(d) of the 1934 Act for not having made a timely filing and for having made the material misstatements and omissions in both Schedules 13D that eventually were filed, as heretofore set forth. This failure to make a timely filing and these material misstatements and omissions have caused and continue to cause irreparable harm and injury to GAF, its share-

holders, and the investing public, all of whom are entitled to a timely disclosure of the information required by Section 13(d) in complete and accurate form. This irreparable harm and injury will continue unless defendants and their group are enjoined from violating Section 13(d) and enjoined from their activities in furtherance of the conspiracy until its effects are fully dissipated.

SECOND CLAIM FOR RELIEF

16. This claim arises under Section 10(b) of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78j), and Rule 10b-5 promulgated thereunder by the Commission. This Court's jurisdiction over this claim is predicated upon Section 27 of such Act.

17. Plaintiff repeats and realleges paragraphs 5 through 14, both inclusive, of this Complaint with the same force and effect as if such paragraphs were set forth here in full.

18. The Schedules 13D filed by the defendants contain untrue statements of material facts and omit to state material facts necessary in order to make the statements made in such Schedules, in the light of the circumstances under which such statements were made, not misleading, as alleged in paragraphs 13 and 14 hereinabove.

19. Defendants have depressed and continue to depress the market price of GAF stock in order to facilitate the acquisition of additional shares of such stock by them at lower prices. Defendants' efforts to depress the market price of such stock include: the withdrawal of substantial business normally placed with GAF by companies whose operations are controlled by the defendants with consequent reduction in the earnings of GAF; the attempt to

disparage the management of GAF among shareholders and in the investment community; and the bringing of an action in this Court against, among others, GAF and its directors, entitled *Paul Milstein* v. *Jesse Werner, et al.*, 70 Civ. 2178 MP, and a companion action with the same title in the Supreme Court of the State of New York, New York County, Index No. 19158/70. The market price of GAF stock also has been and continues to be depressed by defendants' concealment prior to September 24, 1970 of their true position in GAF stock, and thereafter, by the material misstatements and omissions of material facts in their two Schedules 13D.

20. Defendants have acquired the beneficial ownership of at least 209,300 shares of GAF common stock, having a value in excess of $2,000,000, from former shareholders of GAF who sold their stock either without the benefit of the disclosure defendants were required to make or after defendants' Schedules 13D containing the material misstatements and omissions of material facts heretofore set forth were filed.

21. Defendants' failure to make a timely filing, their material misstatements and omissions of material facts in the Schedules 13D they eventually did file, and their other fraudulent and deceptive practices alleged herein violated and continue to violate Section 10(b) of the Securities Exchange Act of 1934, as amended, and Rule 10b-5 promulgated by the Commission thereunder. As stated in the second Schedule 13D, 83,300 shares of GAF common stock owned beneficially by defendants Paul and Seymour Milstein were acquired less than one month prior to the date of that Schedule, November 10, 1970. These violations of Section 10(b) and Rule 10b-5 have caused and continue

to cause irreparable injury to GAF's shareholders and the investing public. This irreparable harm and injury will continue unless defendants and others conspiring and acting in concert with them are enjoined from their unlawful activities.

WHEREFORE, Plaintiff GAF Corporation respectfully prays:

A. That the defendants and others conspiring and acting in concert with them be preliminarily enjoined from:

(1) acquiring or attempting to acquire in any manner any shares of any class of GAF stock;

(2) soliciting from any GAF shareholder any proxy, consent, authorization, or support to vote GAF stock;

(3) voting any shares of GAF stock held or acquired during the conspiracy; and

(4) otherwise acting in furtherance of the conspiracy or endeavoring to enlarge the number of participants in the conspiracy.

B. That the defendants and others conspiring and acting in concert with them be enjoined from taking any of the actions set forth in Paragraphs A(1) through (4), both inclusive, immediately above until the effects of the conspiracy have been fully dissipated and the unlawful acts committed pursuant to the conspiracy fully corrected, including but not limited to, the filing by the defendants and others conspiring and acting in concert with them of an accurate and sufficient statement pursuant to the provisions of Section 13(d) of the Securities Exchange Act of 1934, as amended.

C. That it be awarded its costs and disbursements herein.

D. That it have such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
December 16, 1970

WINTHROP, STIMSON, PUTNAM & ROBERTS

By s/ EDWIN J. WESELY
A Member of the Firm
Attorneys for Plaintiff
GAF Corporation
40 Wall Street
New York, New York 10005

Exhibit A to Complaint

Exhibit A

SCHEDULE 13D—INFORMATION TO BE INCLUDED IN STATEMENTS FILED PURSUANT TO RULE 13d-1 OR 14d-1*

ITEM 1. *Security and Issuer.*

This Schedule relates to the $1.20 Convertible Preferred Stock (hereinafter referred to as the "Preferred Stock") of GAF Corporation, a Delaware corporation, having its principal executive offices at 140 West 51st Street, New York, New York 10020 (hereinafter referred to as "GAF") and is being filed by the persons identified in Item 2 below.

As more fully set forth in Item 4 hereof, the persons filing this Schedule disclaim that the provisions of Section 13(d) of the Securities Exchange Act and the Rules and Regulations promulgated by the Securities and Exchange Commission thereunder (collectively referred to herein as the "Act") are applicable to their respective shares of GAF Preferred Stock. They file this Schedule for the reasons set forth in Item 4 hereof.

ITEM 2. *Identity and Background.*

(a) This Schedule is being filed by Paul Milstein, Seymour Milstein, Gloria Milstein Flanzer and Morris Milstein (such persons being hereinafter sometimes collectively referred to as the "Milstein family"). Morris Milstein is the father of Paul and Seymour Milstein and of Gloria Milstein Flanzer.

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* See Item 4 hereof.

Exhibit A to Complaint

The business address of each member of the Milstein family is as follows:

Paul Milstein 4377 Bronx Boulevard New York, New York 10466	Gloria Milstein Flanzer 40 Dorset Road Scarsdale, New York 10583
Seymour Milstein 30 Rockefeller Plaza New York, New York 10020	Morris Milstein 4377 Bronx Boulevard New York, New York 10466

(b) The residence address of each member of the Milstein family is as follows:

Paul Milstein 76 Birchall Drive Scarsdale, New York 10583	Gloria Milstein Flanzer 40 Dorset Road Scarsdale, New York 10583
Seymour Milstein 35 Ogden Road Scarsdale, New York 10583	Morris Milstein 28 Paddington Road Scarsdale, New York 10583

(c) The principal occupations or employments of each member of the Milstein family and the name, principal business and address of the corporations or other organizations in which such employments are carried on are as follows:

Paul Milstein is the President of Circle Floor Co., Inc., 4377 Bronx Boulevard, New York, New York 10466. Circle Floor Co., Inc. is engaged in the acoustical tile and flooring business and is a wholly-owned subsidiary of Kinney National Service, Inc., a New York corporation whose principal executive offices are located at 10 Rockefeller Plaza, New York, New York 10020.

Seymour Milstein is a private investor with offices at 30 Rockefeller Plaza, New York, New York 10020.

Gloria Milstein Flanzer is a housewife and is not engaged in any business occupation or employment.

Morris Milstein is the Chairman of the Board of Circle Floor Co., Inc.

(d) The material occupations, positions, offices or employments during the last ten years of each member of the Milstein family are as follows:

Paul Milstein has been principally engaged in an executive capacity with Circle Floor Co., Inc. (and related companies) for more than the past ten years. He is a director of Kinney National Service, Inc., having been elected as such director in September, 1968, following the acquisition of Circle Floor Co., Inc. by Kinney National Service, Inc. in July, 1968.

Seymour Milstein has been principally engaged as a private investor since 1968. For more than ten years prior thereto, Mr. Milstein was principally engaged as an executive in the building materials manufacturing industry. Mr. Milstein was a Vice President, director and member of the executive committee of The Ruberoid Co. from 1960 to 1962 and a Senior Vice President of The Ruberoid Co. from 1962 to 1967. Following the merger of The Ruberoid Co. into GAF in May, 1967, Mr. Milstein was Senior Vice President of The Ruberoid Division of GAF until December, 1967 and was a director of GAF from June, 1967 until April, 1968.

Gloria Milstein Flanzer has been a housewife for more than the past ten years and has not engaged in any business occupation or employment.

Morris Milstein has been principally engaged in an executive capacity with Circle Floor Co., Inc. (and related companies) for more than the last ten years and has been Chairman of the Board of Circle Floor Co., Inc. since prior to 1960.

(e) During the past ten years and prior thereto, no member of the Milstein family has been convicted in a criminal proceeding (except for traffic violations or similar infractions).

ITEM 3. *Source and Amount of Funds or Other Consideration.*

As set forth in Item 5 of this Schedule, all of the shares of GAF Preferred Stock beneficially owned by the respective members of the Milstein family were acquired by them on May 26, 1967 upon consummation of the merger of The Ruberoid Co. into GAF in exchange for shares of capital stock of The Ruberoid Co. then owned respectively by them. Certain of the shares of The Ruberoid Co. were held by some of the members of the Milstein family in margin accounts with brokers. Certain of the GAF Preferred Shares received in exchange for shares of The Ruberoid Co. are held in margin accounts.

The members of the Milstein family have no present intention as to whether or not any additional securities of GAF may be acquired by them in the future and, accordingly, can have no present intention as to whether such purchase, if made, would be made with their personal funds or with funds or other consideration borrowed or otherwise obtained for the purpose of acquiring such securities. See Item 4 below.

ITEM 4. *Purpose of Transaction.*

As indicated in Item 3 of this Schedule above, the shares of Preferred Stock to which this Schedule relates were acquired by the respective members of the Milstein family on May 26, 1967 upon consummation of the merger of The Ruberoid Co. into GAF in exchange for shares of capital

stock of The Ruberoid Co. then owned by them. From the date of the acquisition of such shares of GAF Preferred Stock, such shares have been held and are still being held by the respective members of the Milstein family as investments.

The 62,000 shares of GAF Common Stock beneficially owned by Paul Milstein and the 64,000 shares of GAF Common Stock beneficially owned by Seymour Milstein referred to in Item 5 below, were acquired by each of them as an investment, and were and continue to be held by each of them as an investment.

On May 27, 1970, Paul Milstein filed a complaint in the United States District Court for the Southern District of New York (70 Civ. 2178), on behalf of himself as a shareholder of GAF Corporation as well as in the right of that corporation and on behalf of all other shareholders similarly situated, against Jesse Werner, Chairman of the Board and President of GAF, together with GAF itself and a number of individuals who are or were at the relevant period officers or directors or both, in which the plaintiff alleges violations of Rule 10b-5 and 14a-9 under the Securities Exchange Act of 1934 as well as waste of corporate assets through the payment of excessive compensation to the defendant Werner. In that complaint the plaintiff seeks, among other things, (1) rescission of a certain stock purchase plan, together with all issuances of stock under the the plan, and (2) an accounting for all excessive compensation. A companion action is pending in the Supreme Court of the State of New York in New York County.

Depending on the course of corporate affairs of GAF, including this litigation, the undersigned at some future time may determine to attempt to acquire control of GAF, whether through a tender offer, the solicitation of proxies,

or otherwise. In that event, appropriate additional filings will be made. The undersigned find it impossible at this time to state more specificially whether they may attempt to acquire control in the future or, in the event they might acquire control in the future, what their plans would be. The undersigned have been advised by counsel that no filing whatever is required at this time, and they disclaim any necessity to make this filing. They have filed this Schedule only because (1) counsel for the defendants in the above mentioned federal litigation advised the Judge during the course of a pretrial conference that in their opinion a filing was required; (2) the undersigned desire to obviate any question in the pending litigation; and (3) they desire also to make available the information herein contained concerning the Milstein family and their holdings of GAF securities so that the data specified in Schedule 13D may be freely available to GAF and its shareholders as well as the Securities and Exchange Commission, the stock exchanges on which GAF securities are traded, and the public generally.

ITEM 5. *Interest in Securities of the Issuer.*

The number of shares of GAF Preferred Stock beneficially owned by each member of the Milstein family as at the date hereof is as follows:

Name	*No. of Shares of Preferred Stock*
Paul Milstein	95,272
Seymour Milstein	94,570
Gloria Milstein Flanzer	95,682(1)
Morris Milstein	38,642
Total	324,166(2)

(1) Includes 25,000 shares of GAF Preferred Stock held by a trust for the benefit of Gloria Milstein Flanzer of which Gloria Milstein Flanzer and Seymour Milstein are Trustees.

Exhibit A to Complaint

This Schedule relates solely to shares of GAF Preferred Stock and not to any other securities of GAF. However, for the reasons heretofore stated, information has been furnished in Item 4 that, in addition to the above mentioned shares of GAF Preferred Stock to which this Schedule relates, as at the date hereof, Paul Milstein owned beneficially 62,000 shares of GAF Common Stock and Seymour Milstein owned beneficially 64,000 shares of GAF Common Stock. Such shares of GAF Common Stock are held in margin accounts.

No member of the Milstein family or any of their "associates" (as that term is defined in the Act) has the right to acquire, directly or indirectly, any shares of GAF Preferred Stock or Common Stock (except that each share of GAF Preferred Stock is convertible into 1¼ shares of GAF Common Stock).

No member of the Milstein family or any of their "associates" have had any transactions in shares of GAF Preferred Stock or Common Stock during the sixty-day period preceding the date of this Schedule.

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(2) These 324,166 shares constitute approximately 10.25% of the total of 3,162,664 shares of GAF Preferred Stock outstanding on March 6, 1970. In addition to these 324,166 shares of GAF Preferred Stock, an aggregate of 28,808 shares of Preferred Stock may be considered as being beneficially owned by members of the Milstein family for purposes of Section 13(d) of the Act as follows: The respective spouses of Paul Milstein, Seymour Milstein and Gloria Milstein Flanzer each owned beneficially 256 shares and children of Paul Milstein and Gloria Milstein Flanzer owned beneficially an aggregate of 330 shares; an aggregate of 10,218 shares were held by members of the Milstein family as trustees for the benefit of eight children of Paul Milstein, Seymour Milstein and Gloria Milstein Flanzer; an aggregate of 19,432 shares were held by members of the Milstein family as Custodians under the Gifts to Minors Act for such eight children; and an aggregate of 7,060 shares were owned by three family charitable foundations. The members of the Milstein family disclaim any beneficial interest in the aggregate of 28,808 shares referred to in this footnote (2).

Exhibit A to Complaint

ITEM 6. *Contracts, Arrangements, or Understandings with Respect to Securities of the Issuer.*

No member of the Milstein family or any of their "associates" has at the date of this Schedule, any contracts, arrangements or understandings (including but not limited to transfer of any such securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of profit, division of losses or profits, or the giving or withholding of proxies) with any other person with respect to any securities of GAF.

ITEM 7. *Persons Retained, Employed or to be Compensated.*

This Schedule does not relate to a tender offer, or request or invitation for tenders, for any securities of GAF. See Item 4 above.

ITEM 8. *Material to be Filed as Exhibits.*

None.

SIGNATURES

The undersigned certify that to the best of their knowledge and belief the information set forth in this statement is true, complete and correct.

September 24, 1970

PAUL MILSTEIN

Paul Milstein

SEYMOUR MILSTEIN

Seymour Milstein

GLORIA MILSTEIN FLANZER

Gloria Milstein Flanzer

MORRIS MILSTEIN

Morris Milstein

Exhibit B to Complaint

Exhibit B

RESTATED AND AMENDED SCHEDULE 13D
(Dated November 10, 1970)*

SCHEDULE 13D—INFORMATION TO BE INCLUDED IN STATEMENTS FILED PURSUANT TO RULE 13d-1 OR 14d-1**

ITEM 1. *Security and Issuer.*

This Schedule relates to the $1.20 Convertible Preferred Stock (hereinafter referred to as the "Preferred Stock") of GAF Corporation, a Delaware corporation, having its principal executive offices at 140 West 51st Street, New York, New York 10020 (hereinafter referred to as "GAF") and is being filed by the persons identified in Item 2 below.

As more fully set forth in Item 4 hereof, the persons filing this Schedule disclaim that the provisions of Section 13(d) of the Securities Exchange Act and the Rules and Regulations promulgated by the Securities and Exchange Commission thereunder (collectively referred to herein as the "Act") are applicable to their respective shares of GAF Preferred Stock. They file this Schedule for the reasons set forth in Item 4 hereof.

ITEM 2. *Identity and Background.*

(a) This Schedule is being filed by Paul Milstein, Seymour Milstein, Gloria Milstein Flanzer and Morris Milstein (such persons being hereinafter sometimes collectively referred to as the "Milstein family"). Morris Milstein is the

* This Restated and Amended Schedule 13D restates the original Schedule 13D, dated September 24, 1970, and amends Items 3, 4 and 5 thereof.

** See Item 4 hereof.

father of Paul and Seymour Milstein and of Gloria Milstein Flanzer.

The business address of each member of the Milstein family is as follows:

Paul Milstein 4377 Bronx Boulevard New York, New York 10466	Gloria Milstein Flanzer 40 Dorset Road Scarsdale, New York 10583
Seymour Milstein 30 Rockefeller Plaza New York, New York 10020	Morris Milstein 4377 Bronx Boulevard New York, New York 10466

(b) The residence address of each member of the Milstein family is as follows:

Paul Milstein 76 Birchall Drive Scarsdale, New York 10583	Gloria Milstein Flanzer 40 Dorset Road Scarsdale, New York 10583
Seymour Milstein 35 Ogden Road Scarsdale, New York 10583	Morris Milstein 28 Paddington Road Scarsdale, New York 10583

(c) The principal occupations or employments of each member of the Milstein family and the name, principal business and address of the corporations or other organizations in which such employments are carried on are as follows:

Paul Milstein is the President of Circle Floor Co., Inc., 4377 Bronx Boulevard, New York, New York 10466. Circle Floor Co., Inc. is engaged in the acoustical tile and flooring business and is a wholly-owned subsidiary of Kinney National Service, Inc., a New York corporation whose principal executive offices are located at 10 Rockefeller Plaza, New York, New York 10020.

Seymour Milstein is a private investor with offices at 30 Rockefeller Plaza, New York, New York 10020.

Exhibit B to Complaint

Gloria Milstein Flanzer is a housewife and is not engaged in any business occupation or employment.

Morris Milstein is the Chairman of the Board of Circle Floor Co., Inc.

(d) The material occupations, positions, offices or employments during the last ten years of each member of the Milstein family are as follows:

Paul Milstein has been principally engaged in an executive capacity with Circle Floor Co., Inc. (and related companies) for more than the past ten years. He is a director of Kinney National Service, Inc., having been elected as such director in September, 1968, following the acquisition of Circle Floor Co., Inc. by Kinney National Service, Inc. in July, 1968.

Seymour Milstein has been principally engaged as a private investor since 1968. For more than ten years prior thereto, Mr. Milstein was principally engaged as an executive in the building materials manufacturing industry. Mr. Milstein was a Vice President, director and member of the executive committee of The Ruberoid Co. from 1960 to 1962 and a Senior Vice President of The Ruberoid Co. from 1962 to 1967. Following the merger of The Ruberoid Co. into GAF in May, 1967, Mr. Milstein was Senior Vice President of The Ruberoid Division of GAF until December, 1967 and was a director of GAF from June, 1967 until April, 1968.

Gloria Milstein Flanzer has been a housewife for more than the past ten years and has not engaged in any business occupation or employment.

Morris Milstein has been principally engaged in an executive capacity with Circle Floor Co., Inc. (and related companies) for more than the last ten years and has been

Chairman of the Board of Circle Floor Co., Inc. since prior to 1960.

(e) During the past ten years and prior thereto, no member of the Milstein family has been convicted in a criminal proceeding (except for traffic violations or similar infractions).

ITEM 3. *Source and Amount of Funds or Other Consideration.*

As set forth in Item 5 of this Schedule, all of the shares of GAF Preferred Stock beneficially owned by the members of the Milstein family were acquired by them on May 26, 1967 upon consummation of the merger of The Ruberoid Co. into GAF in exchange for shares of capital stock of The Ruberoid Co. then owned by them (except for 1,200 shares of GAF Preferred Stock purchased in September, 1967 in open market transactions by Seymour Milstein essentially for the purpose of replacing 1,100 shares which were the subject of a charitable contribution by Seymour Milstein in June, 1967). Certain of the shares of The Ruberoid Co. were held by some of the members of the Milstein family in margin accounts with brokers. Certain of the GAF Preferred Shares received in exchange for shares of The Ruberoid Co. (and those purchased by Seymour Milstein as aforesaid) are held in margin accounts.

The members of the Milstein family have no present intention as to whether or not any additional securities of GAF may be acquired by them in the future and, accordingly, can have no present intention as to whether such purchase, if made, would be made with their personal funds or with funds or other consideration borrowed or otherwise obtained for the purpose of acquiring such securities. See Item 4 below.

Exhibit B to Complaint

ITEM 4. *Purpose of Transaction.*

As indicated in Item 3 of this Schedule above, the shares of Preferred Stock to which this Schedule relates (with the exception of 1,200 shares purchased by Seymour Milstein in September, 1967) were acquired by the members of the Milstein family on May 26, 1967 upon consummation of the merger of The Ruberoid Co. into GAF in exchange for shares of capital stock of The Ruberoid Co. then owned by them. The shares of Preferred Stock of GAF now beneficially owned by the members of the Milstein family were derived essentially from such merger and such shares have been held from the date of aequisition and are still being held by the members of the Milstein family as investments.

The 103,650 shares of GAF Common Stock beneficially owned by Paul Milstein and the 105,650 shares of GAF Common Stock beneficially owned by Seymour Milstein referred to in Item 5 below, were acquired by each of them as an investment, and were and continue to be held by each of them as an investment.

On May 27, 1970, Paul Milstein filed a complaint in the United States District Court for the Southern District of New York (70 Civ. 2178), on behalf of himself as a shareholder of GAF Corporation as well as in the right of that corporation and on behalf of all other shareholders similarly situated, against Jesse Werner, Chairman of the Board and President of GAF, together with GAF itself and a number of individuals who are or were at the relevant period officers or directors or both, in which the plaintiff alleges violations of Rules 10b-5 and 14a-9 under the Securities Exchange Act of 1934 as well as waste of corporate assets through the payment of excessive compensation to the defendant Werner. In that complaint the plaintiff seeks, among other things, (1) rescission of a certain stock pur-

chase plan, together with all issuances of stock under the plan, and (2) an accounting for all excessive compensation. A companion action is pending in the Supreme Court of the State of New York in New York County.

Depending on the course of corporate affairs of GAF, including this litigation, the undersigned at some future time may determine to attempt to acquire control of GAF, whether through a tender offer, the solicitation of proxies, or otherwise. In that event, appropriate additional filings will be made. The undersigned find it impossible at this time to state more specifically whether they may attempt to acquire control in the future or, in the event they might acquire control in the future, what their plans would be. The undersigned have been advised by counsel that no filing whatever is required at this time, and they disclaim any necessity to make this filing. They have filed this Schedule only because (1) counsel for the defendants in the above mentioned federal litigation advised the Judge during the course of a pretrial conference that in their opinion a filing was required; (2) the undersigned desire to obviate any question in the pending litigation; and (3) they desire also to make available the information herein contained concerning the Milstein family and their holdings of GAF securities so that the data specified in Schedule 13D may be freely available to GAF and its shareholders as well as the Securities and Exchange Commission, the stock exchanges on which GAF securities are traded, and the public generally.

ITEM 5. *Interest in Securities of the Issuer.*

The number of shares of GAF Preferred Stock beneficially owned by each member of the Milstein family as at the date hereof is as follows:

Exhibit B to Complaint

Name	*No. of Shares of Preferred Stock*
Paul Milstein	95,272
Seymour Milstein	94,570
Gloria Milstein Flanzer	95,682(1)
Morris Milstein	38,642
Total	324,166(2)

(1) Includes 25,000 shares of GAF Preferred Stock held by a trust for the benefit of Gloria Milstein Flanzer of which Gloria Milstein Flanzer and Seymour Milstein are Trustees.

(2) These 324,166 shares constitute approximately 10.25% of the total of 3,162,664 shares of GAF Preferred Stock outstanding on March 6, 1970. In addition to these 324,166 shares of GAF Preferred Stock, an aggregate of 28,808 shares of Preferred Stock may be considered as being beneficially owned by members of the Milstein family for purposes of Section 13(d) of the Act as follows: The respective spouses of Paul Milstein, Seymour Milstein and Gloria Milstein Flanzer each owned beneficially 256 shares and children of Paul Milstein and Gloria Milstein Flanzer owned beneficially an aggregate of 330 shares; an aggregate of 10,218 shares were held by members of the Milstein family as trustees for the benefit of eight children of Paul Milstein, Seymour Milstein and Gloria Milstein Flanzer; an aggregate of 19,432 shares were held by members of the Milstein family as Custodians under the Gifts to Minors Act for such eight children; and an aggregate of 7,060 shares were owned by three family charitable foundations. The members of the Milstein family disclaim any beneficial interest in the aggregate of 28,808 shares referred to in this footnote (2).

This Schedule relates solely to shares of GAF Preferred Stock and not to any other securities of GAF. However, for the reasons heretofore stated, information has been furnished in Item 4 that, in addition to the above mentioned shares of GAF Preferred Stock to which Schedule relates, as at the date hereof, Paul Milstein owned beneficially 103,650 shares of GAF Common Stock and Seymour Mil-

stein owned beneficially 105,650 shares of GAF Common Stock. Such shares of GAF Common Stock are held in margin accounts and include 41,650 shares purchased by each of Paul Milstein and Seymour Milstein in open market transactions between October 21, 1970 and November 10, 1970.

No member of the Milstein family or any of their "associates" (as that term is defined in the Act) has the right to acquire, directly or indirectly, any shares of GAF Preferred Stock or Common Stock (except that each share of GAF Preferred Stock is convertible into 1¼ shares of GAF Common Stock).

Except for the purchases of Common Stock in October and November, 1970 referred to above, no member of the Milstein family or any of their "associates" have had any transactions in shares of GAF Preferred Stock or Common Stock during the sixty-day period preceding the date of this Schedule.

ITEM 6. *Contracts, Arrangements, or Understandings with Respect to Securities of the Issuer.*

No member of the Milstein family or any of their "associates" has at the date of this Schedule, any contracts, arrangements or understandings (including but not limited to transfer of any such securities, joint ventures, loan or option arrangements, puts or calls, guarantees against loss or guarantees of profit, division of losses or profits, or the giving or withholding of proxies) with any other person with respect to any securities of GAF.

Exhibit B to Complaint

ITEM 7. *Persons Retained, Employed or to be Compensated.*

This Schedule does not relate to a tender offer, or request or invitation for tenders, for any securities of GAF. See Item 4 above.

ITEM 8. *Material to be Filed as Exhibits.*

None.

SIGNATURES

The undersigned certify that to the best of their knowledge and belief the information set forth in this statement is true, complete and correct.

November 10, 1970

PAUL MILSTEIN

Paul Milstein

SEYMOUR MILSTEIN

Seymour Milstein

SEYMOUR MILSTEIN

for Gloria Milstein Flanzer

SEYMOUR MILSTEIN

for Morris Milstein